

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

2. After searching the Vermont Criminal Information Center database, CDD denied the petitioner's request on August 7, 2008 because of seven convictions for crimes involving theft and fraud. The most recent conviction, for retail theft, was in April 2008. In its notice, CDD cited its regulation providing that a "person found to have

committed fraud, a felony or other offenses involving violence" may not be a daycare provider.

3. The petitioner's appeal, including a request for a variance, is based on her representations that she has reformed and has bonded with her friend's children and that they trust her as a caregiver.

4. On November 13, 2008, the Commissioner's representative sent a written letter to the petitioner which upheld the CDD's denial of the LECC application. The letter reviewed the evidence and also concluded that any variance would not be granted for at least a year because the petitioner's convictions were for serious crimes involving obtaining money and property through fraudulent means, which is a concern for a program that relies on providers to submit accurate attendance records.

5. At her hearing held on December 16, 2008, the petitioner reiterated the arguments she had made before the Commissioner. She also stated she felt she was being "singled out" by the Department because she knew another person with a LECC certificate who is "abusive" to the children in her care. The Department took the name of this individual from the petitioner and indicated that it would investigate the matter.

ORDER

The decision of CDD denying the petitioner's application for an LECC certificate based on prohibitions in its regulations is affirmed. Its decision to deny a variance is also affirmed.

REASONS

The Legally Exempt Childcare program exists to certify persons for daycare payments through CDD who are caring for specific children, often relatives, who are eligible for daycare payments and who do not wish to become general daycare providers to the public. Regulations adopted by CDD to govern its Legally Exempt Childcare provider program prevent certain persons from receiving certification for payment by CDD for providing daycare:

The following persons may not be providers, be present in, or reside in the home of the Provider:

- a person found by the court to have committed fraud, a felony, or other offenses involving violence or unlawful sexual activity or other bodily injury to another person including, but not limited to, abuse, neglect or sexual activity with a child;

. . .

Legally Exempt Child Care Provider
Requirements, Section B, Number 1

Although the above provision is labeled "health and safety", CDD maintains that the regulation is also designed to prevent persons of adjudicated dishonesty from participating in the program in order to protect the fiscal health of the program. This is because the program relies upon the honesty of providers with regard to reporting the number of hours worked and payments due. The Board has repeatedly affirmed the Department's position in this regard. See e.g. Fair Hearing Nos. 17,322 and 19,714.

The petitioner does not dispute that she has been convicted of several crimes involving fraud and theft, the most recent being in April 2008. Given those facts, CDD clearly followed its regulation in finding that the petitioner is a prohibited provider under the regulations and cannot be granted a LECC certificate. The Board is bound to affirm any decision by CDD which is consistent with its regulations. 3 V.S.A. § 3091(d), Fair Hearing Rule 1000.4D.

The Department also has provisions in its regulations granting the Commissioner the authority to grant a variance, if requested to do so, of any LECC regulation. However, because this is a question requiring the Commissioner to exercise his judgment and discretion, the Board may not substitute its own judgment unless the decision of the

Commissioner is arbitrary or capricious. See Fair Hearing Nos. 15,652 and 19,714. Given the recent and repeated nature of the petitioner's crimes, it must be concluded that the Department's decision not to grant the petitioner's request for a variance is within its discretion and is based on reasonable, relevant, and timely concerns about the petitioner's character.

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